La-Z-Boy Midwest, a Division of La-Z-Boy Incorporated *and* Pace International Union, AFL–CIO, CLC. Cases 17–CA–20888, 17–CA–21006, and 17–CA–21065

September 9, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On July 20, 2001, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. Pursuant to the Board's invitation, both the General Counsel and the Respondent also filed supplemental briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, except as indicated below, and to adopt the recommended Order as modified.[3]

The judge found, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing employee John Phillips a verbal warning for engaging in misconduct in the course of his union solicitation activities. The judge based this finding on the absence of credible evidence that Phillips had engaged in the alleged misconduct.

Although we agree with the judge's conclusion that the Respondent unlawfully disciplined Phillips, we find that he erred in applying the analytical framework for dual motivation cases established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), because there is no dispute as to the reason for the discipline. Thus, the Respondent's motivation is not at issue, and the *Wright Line* analysis is not appropriate. See *Felix Industries*, 331 NLRB 144, 146 (2000), remanded on other grounds 251 F.3d 1051 (D.C. Cir. 2001). Rather, in these circumstances, the proper analytical framework is that found in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). In *Burnup & Sims*, the Supreme Court affirmed the Board's rule that an employer violates Section 8(a)(1) by discharging or disciplining an employee based on its good-faith but mistaken belief that the employee engaged in misconduct in the course of protected activity. Id. at 23–24.

Applying the *Burnup & Sims* analysis to this case, we note that while the Respondent disputes that its verbal warning was discipline, there is no dispute that, in verbally warning Phillips, the Respondent acted on a good-faith belief that Phillips had threatened another employee in the course of his solicitation activities. The judge found, however, that the Respondent issued Phillips a verbal warning as the first step in the Respondent's progressive disciplinary system, and that Phillips in fact had not engaged in the misconduct for which he received the verbal warning. Thus, we agree with the judge's finding that Phillips was not shown to have engaged in misconduct and, as noted above, we agree that Phillips was disciplined. We do not find that Phillips was simply told about the report the Respondent had received that he had engaged in misconduct and that, if this were the case, the misconduct was serious and he should cease engaging in it.

Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by disciplining Phillips. In view of this conclusion, we find it unnecessary to pass on whether the Respondent's conduct in this regard also violated Section 8(a)(3) of the Act. See *Shamrock Foods Co.*, 337 NLRB No. 138, slip op. at 1 (2002).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders La-Z-Boy Midwest, a Division of La-Z-Boy Incorporated, Neosho, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Issuing verbal warnings to employees that interfere with activities protected by Section 7 of the Act."

[1] On April 24, 2003, we invited the parties to submit supplemental briefs addressing the applicability of the analytical framework established in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), to the Respondent's issuance of a verbal warning to employee John Phillips. The General Counsel and the Respondent filed such briefs. We have carefully reviewed these supplemental briefs, and for the reasons discussed herein, we find that the *Burnup & Sims* analysis is, in fact, the appropriate analysis to apply to Phillips' discipline.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces us that they are incorrect. *Standard Dry Wall Product,*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the recommended Order and notice to employees to more closely conform with the standard language for our remedial provisions, as well as with our findings and conclusions in this decision. We shall also substitute a new notice in accordance with our decision in *Ishikawa Gasket America*, 337 NLRB No. 29 (2001).

2. Substitute the following for paragraph 1(b).

"(b) Assessing attendance points to employees because they form, join, or assist a union and/or engage in protected concerted activities and to discourage them from engaging in such activities."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 9, 2003

Wilma B. Liebman,	Member
Peter C. Schaumber	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue you verbal warnings that interfere with any of the activities set forth above.

WE WILL NOT assess attendance points to you because you form, join, or assist a union and/or engage in protected concerted activities and to discourage you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the verbal warning unlawfully issued to John Phillips and to the two attendance points unlawfully assessed to Klint Guinn for August 11, 2000, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the verbal warning and the attendance points, respectively, will not be used against them in any way.

LA-Z-BOY MIDWEST, A DIVISION OF LA-Z-BOY INCORPORATED

Stanley D. Williams, Esq., for the General Counsel.
Rick E. Temple, Esq., of Springfield, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried at Joplin, Missouri, on April 5, 2001. A charge was filed by Pace International Union, AFL–CIO, CLC (Union) against LA-Z Boy Midwest, a Division of LA-Z Boy Incorporated (Respondent) in Case 17–CA–20888 on October 10, 2000, and it was amended on November 17, 2000. A complaint was issued on November 22, 2000, in that case. The Union filed a charge in Case 17–CA–21006 on December 27, 2000, and it was amended on February 6, 2001. A consolidated complaint in Cases 17–CA–20888 and 17–CA–21006 was issued on February 21, 2001. The Union filed a charge in Case 17–CA–21065 on February 13, 2001, and amended the charge on March 20, 2001. A second consolidated complaint was issued on March 22, 2001. As amended at the trial herein, it alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act), and Section 8(a)(1) and (3) of the Act by issuing a verbal warning to employee John Phillips on June 16, 2000, and by assessing employee Klint Guinn two attendance points on August 14, 2000, because these two employees formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. The Respondent denies violating the Act as alleged. Additionally, the Respondent asserts that the issuance of the complaint in Case 17–CA–21065 is in error as a matter of law since the underlying charge was not filed and served within 6 months of the alleged unfair labor practice as required by Section 10(b) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Neosho, Missouri, has been engaged in the manufacture of upholstered furniture. During the 12-month period ending August 31, 2000, the Respondent purchased and received at its above-described facility goods and services valued in excess of $50,000 directly from points outside the State of Missouri. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section

2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

FACTS

The Respondent's Exhibits 1 and 2 were received pursuant to a stipulation. The former consists of pages 9 through 13 of the factory employee handbook, which pages deal with harassment and attendance. The latter is the Respondent's rules of conduct, which cover the steps of the disciplinary procedure and describe prohibited conduct.

Requesting that official notice be taken, General Counsel introduced General Counsel's Exhibits 2 and 3. The former is a Decision and Direction of a Second Election of the National Labor Relations Board (Board) in Case 17–RC–11879, involving LA-Z Boy Midwest and the Union, dated December 7, 2000. In footnote 3 of the decision, the Board indicates that the notice of the second election should include language informing the employees that the first election was set aside because the Board found that certain conduct by the employer interfered with the employees' free choice. The latter is the hearing officer's underlying report on objections. Citing *Advertisers Mfg. Co.*, 275 NLRB 100 (1985), General Counsel asserts that the evidence and information in these documents will aid in determining animus and motivation for the conduct at issue in the instant proceeding. The Respondent objected citing note 3 in the judge's decision in *St. Francis Hospital*, 263 NLRB 834 (1982). Both exhibits were received with the indication that official notice would be taken of the Board's decision.

John Phillips has worked for the Respondent for over 9 years, holding the position of inspector for the last 6 years. He testified that some employees were not happy with the way things were going at the Respondent and so they contacted the Union; that usually once a week he handbilled employees coming in or out of the plant with union literature at the gates at LA-Z Boy, normally in the afternoon before work between 3:30 and 3:50 p.m.; that he handbilled prior to June 16, 2000; that during breaks and at lunchtime he would talk to other employees to get them interested in supporting the Union; that he solicited signatures on authorization cards or petitions during breaks and at lunch beginning in April 2000; and that before June 16, 2000 he wore "Vote Yes" and PACE buttons while working and his supervisor had an opportunity to observe him wearing these buttons.

On June 16, 2000, Phillips was inspecting chairs in the inspection area when his immediate supervisor, Wayne Allen, told him that he needed to see him in the inspection office, which is in the inspection area where he was working. Phillips testified that Dave Harris, who is in charge of Quality on the day shift and Allen's supervisor, were also present; that Harris told him that there had been a complaint that he was soliciting on company time and he told them that he would not do that; that Harris also said that there had been a complaint that he had "threatened to write up anybody's chairs that came up that would not sign a union card" (Tr. p. 34), and he told Harris that there was absolutely no way that he would do that; that Harris said that none of this could be substantiated because it was just one person and he did not have any witnesses; that Harris said that he was a good inspector and Harris would hate to lose him; that he told Harris that he did not say any of that; that Harris told him that he could go and the Company was trying to stop solicitation throughout the plant at the time; that Allen asked him if he was saying that he did not say that and he told Allen that none of that is true; that as he was leaving, Harris said "consider this your verbal warning" (Tr. p. 35); that he considered this to be the first step in the progressive discipline system to fire him; that neither Harris nor Allen identified any employee who allegedly complained about him; that during the meeting neither Harris nor Allen asked him if he understood the Company's solicitation or harassment policy; that he did not solicit any employee to sign a card or petition during work time; that he absolutely did not tell any employee that as inspector he would reject their product if they did not support the Union, or say anything to this effect; that up to May or June 2000, people sold Girl Scout cookies and T-shirts in the plant and no one said anything about it;[1] that he sold Girl Scout cookies for his daughter and some of his scroll saw work in the plant prior to June 2000; that supervisors, including Gary Harrison in upholstery and Rob Watts in cutting, have bought Girl Scout cookies from him; that some of the activity regarding the sale of his scroll saw work would take place on the workroom floor during working time; that prior to June 2000, no one had ever talked to him about his selling Girl Scout cookies or scroll saw products in the plant; that in the summer of 2000 he was told that the Company wanted to stop the solicitation in the plant; that after the Board rerun election in January 2001, he and others were again allowed to sell products in the plant; that in October or November 2000 Carl Talley, who is a supervisor in upholstery, approached him while he was working and Talley was selling candy bars for his children; that 2 days before he testified at the trial herein he sold a scrolled race car to an employee in sewing and her daughter, who is a supervisor in Gathering, brought him a check while he was working; and that in his 9 years with the Respondent he could not remember ever receiving any other discipline.

On cross-examination, Phillips testified that he became active in the union organizing campaign in March or April 2000; that the petition for an election was filed in late June 2000 (June 23, 2000); that as an inspector he has the right to reject an employee's work and that would cost the employee money in

[1] This testimony was corroborated by the testimony of employee Klint Guinn who added raffle tickets, contributions for the needy and for little league teams, and who testified that he has been solicited during production hours on the floor even by supervisors. Guinn also testified that he noticed a change in the enforcement of the Company's no solicitation rule during the late stages of the union organizing campaign in that Manager Larry Reynolds and Supervisor Jerry Von Ach told him that he should not be standing around talking about the Union and handing out union material, flyers, or in-plant organizing committee flyers on company time; that in his 22 years at the plant he had never known of anybody to be disciplined, reprimanded, or called into an office to be instructed not to engage in such conduct, other than matters associated with the Union; and that during the organizing campaign the Company (to his knowledge, Reynolds, Von Ach, and Supervisor Ray Ball) handed out its printed material on the work floor during production time.

that the employees work on an incentive system and they would have to redo the work or lose credit for part of the unit; that on June 16, 2000, or thereafter he did not receive a rules of conduct form like Respondent's Exhibit 4 warning him about the alleged violation of the solicitation and harassment policies; that on June 16, 2000, he was not given anything to sign by his supervisors at the above-described meeting or any time thereafter regarding this meeting; that he was not aware that Allen and Harris wrote e-mails, Respondent's Exhibit 5, documenting this meeting; and that he saw Respondent's Exhibit 5 days before the trial herein. Respondent's Exhibit 5 reads as follows:

> Kevin Wilson
> From: Dave Harris
> Sent: Monday, June 19, 2000, 7:42 a.m.
> To: Kevin Wilson; Allen Keeling
> Cc: Wayne Allen
> Subject: RE: John Phillips
> Importance: High
> Sensitivity: Confidential
>
> Wayne and I both met with John at 4:15 p.m. on Friday, June 6.
>
> We also informed him [This apparently indicates that the memorandum originally first referred to informing Phillips of something else.] that an employee had claimed that he was threatening to reject his units if he did not sign a Union Card. If so, this would be a serious violation of our Harassment policy, whether it happened on his personal time or his work time.
>
> John stated this was untrue and that he was well aware of the Harassment Policy.
>
> -----Original Message-----
> From: Wayne Allen
> Sent: Friday, June 16, 2000, 2:37 p.m.
> To: Dave Harris
> Subject: John Phillips
>
> On 6/16/00 it was brought to our attention that John Phillips was Solicitation [sic] on Company time, and was Harassing Employee. We talked to John about this, and ask [sic] him if he new [sic] the Company Policy Rule on this. John said he did know the Policy. And John denied doing any of the above.

Phillips further testified on cross-examination that with respect to Allen's documentation, they never brought up anything about policies to him; that Harris did say that the Company was working on stopping solicitation but neither Harris nor Allen said anything about harassment; that Harris did not say that if it was true that he threatened to reject units, it would be a serious violation of the harassment policy; that he did not say during this meeting that he was well aware of the harassment policy; and that at the end of the meeting Harris said to consider this a verbal warning but no one else in the Respondent's management told him to consider the June 16, 2000 meeting discipline.

On redirect Phillips testified that the June 16, 2000 meeting took place between 5 and 6 p.m. and that would have been after the "2:37 p.m." on the above-described "Original Message"; and that in the above-described Harris to Wilson memorandum the "June 6" date and the "4:15 p.m." are an error.

The Respondent's employee, Brandon Burris, testified that during the union campaign in the summer of 2000, he received flyers related to the organizing drive regularly from Von Ach at his work station during worktime; and that he had been solicited by a supervisor for contributions to the United Fund.

The Respondent's employee Robert Jackson testified that coworkers have solicited him for donations during worktime in the production area; that he personally solicited for his son's 4–H club; and that during the 2000 union organizing drive foremen distributed literature at his workstation during worktime. On cross-examination, Jackson testified that he was not aware that the Company had a policy regarding solicitation.

When called by the General Counsel, Kevin Wilson, the Respondent's former human resource manager, testified that he worked for the Respondent from 1991 until February 2001; that he oversaw the orientation of new employees; that as a part of the orientation in the summer of 2000, new employees were shown a video explaining the Company's position regarding union representation; that while in the summer of 2000, the Company had an employee handbook with rules of conduct containing a no-solicitation statement, the rule was not enforced unless there was a complaint; that he was aware in the summer of 2000 that on the plant floor people asked for charitable contributions, sold Girl Scout cookies, and solicited for other things such as little league baseball teams and school programs; that complaints were received about employees selling items at their work stations and the employees were told that they could not do that; that up to the summer of 2000 there were no formal restrictions on what employees could and could not talk about while they were working unless it became disruptive; that the Company's progressive discipline policy involved a three-step process and then termination; that step one was a verbal warning, step two was a written warning, step three was a 1–day suspension without pay, and step four was termination; that normally some sort of a memorandum was placed in the employee's file so management would have a record of the verbal warning if something came up later; that such memorandums to the file did not take any particular form (like the Respondent's rules of conduct form, R. Exh. 4), in that sometimes they were handwritten on a piece of paper, sometimes they were via e-mail, and sometimes they were typed; that there was no requirement that memorializations of verbal warnings go in the file, and sometimes these memoranda were kept on the floor in a supervisor's file; that if the memorandum was turned in it could be kept in the regular personnel file; that there was no requirement that the disciplinary writeup form be used for verbal warnings; that he wrote "File" at the top of Respondent's Exhibit 5 and he believed that Respondent's Exhibit 5 was placed in Phillips' file; that when Respondent's Exhibit 5 was placed in the file it was considered step 1 and if similar conduct arose within a 3–month period, it would warrant elevating to step two; and that supervisors distributed company handbills about the Union during working time, and the Company had employee meetings during working time where employees were shown videos made specifically for the organizing campaign.

When called by the Respondent, Wilson testified that Supervisor Larry Whitman indicated that his son Tommy, who is an employee of the Respondent, told him that Phillips had threatened to not pass some of his work because he was not for the Union and he was for the Company; that after he received the complaint he believed that he spoke with Dave Harris or Wayne Allen about investigating it; that Respondent's Exhibit 5 is the report that he received back, and he placed it in the file; and that it was a he said versus what another person said so it was indicated that this would not be tolerated and the matter was not pursued further.

The Respondent's quality manager, William Harris, testified that Wilson, with Larry Whitman in the office, told him that an employee on the upholstery line said that during worktime Phillips had threatened to turn his units around if he did not sign a union card; that he was not given the name of the employee who complained; that he then set about to determine whether or not there were records that showed that Phillips had turned around or rejected an unusual number of units from any employee the previous evening; that he was unable to determine that any one person had any more turnabouts than any other, by job; that if the employee stops their work to repair a unit, the employee loses time and money; that after looking at the records he spoke with Wilson who told him to advise Phillips of what the involved policies were; that he and Allen spoke with Phillips; that Phillips denied the allegation and said that he understood the policy regarding harassment; that he did not recall at all, and he did not know of, telling Phillips during that meeting that he should consider it a verbal warning; that he asked Allen to record the incident and send him an e-mail; that he forwarded Allen's e-mail and his own comments to Wilson, Respondent's Exhibit 5; that the time and the date in the body of his memorandum to Wilson are incorrect; and that he did not know of any discipline to Phillips in regard to this incident.

On cross-examination, Harris testified that initially Wilson asked him to check whether or not there were any computer records of what the inspectors' activities are and whether they showed any particular employee had received an unusual amount of turnabouts; that other than checking the records he did not do any other investigating before he met with Phillips; that he asked Allen if he had heard anything about the incident the previous night, and Allen said no it was quiet; that he was aware that over the years the employees have done a lot of soliciting on the plant floor involving Girl Scout cookies, fund raisers for schools, soliciting for charities, and selling raffle tickets; that employees are not called in for soliciting; that he did remind Phillips during his meeting with him that the Company had a policy against solicitation during working hours; that sending Respondent's Exhibit 5 to Wilson was "more like a courtesy, a common practice, I guess" (Tr. p. 298); and that he does not necessarily consider a memorialization of a meeting with an employee sent to the file to be a verbal warning and the first step in the disciplinary process.

Klint Guinn has worked for the Respondent for over 22 years. In August 2000, he was a parts picker in the frame department and his supervisor was Jerry Von Ach. Guinn worked 6 a.m. to 3:30 p.m. Monday through Thursday and 6 to 10 a.m. on Friday. There are three other parts picker in his group on his shift, namely Allen Collinsworth, Robert Jackson, and Mike Jeffers. In his group, Collinsworth has the most seniority, he is second, Jackson is third, and Jeffers has the least seniority. Guinn was active in the union organizing drive during the summer of 2000, in that he handed out handbills and leaflets, wore union buttons, T-shirts, and union paraphernalia while working, and he was on the in-plant union organizing committee. Guinn testified that before the August 2000 Board election he was discussing the time study methods used on his particular job with Plant Manager Tice who admitted that they had some problems and Tice tapped the union button Guinn was wearing and indicated that that was not the answer either.

On Wednesday, August 9, 2000, according to the testimony of Guinn, while he was working Jerry Von Ach, his supervisor, came through the shop just after 8:30 a.m. and as Von Ach passed he told him that he was going to take Friday off because he had to bale hay, and Von Ach nodded his head and walked off. Guinn further testified that all of his coworkers knew that he was taking Friday off to bale hay.

On Thursday, August 10, 2000, Guinn was an observer for the Union at the Board election. He testified that in the 4 to 6 weeks preceding this the Respondent did not need all four pickers in his group to work; that the practice had been for his supervisor to get with his group and those with the most seniority would have the chance to volunteer to work on Friday; that if his supervisor needed two workers on Friday and the two with the most seniority did not volunteer then the two with the least seniority had to work on Friday; that who worked on Friday would be resolved the day before, on Thursday evening; that this was resolved by the supervisor meeting with the Pickers either as a group or individually; that at 6 a.m. on August 10, 2000, he and coworker Brandon Burris, to whom he had given a ride to work that day, went to the frame supervisors' office and gave Von Ach the notifications that they needed to be released at 11 a.m. to be an election observer and alternate observer for the Union, respectively; that Von Ach took him and Burris out of the office, had them stand about 25 feet apart, and spoke to them separately; that Von Ach told him to clock out at 11 a.m. since the Company would not be paying him while he was an observer, and to place the timecard on Von Ach's desk; that he clocked out at about 11 a.m., placed his time card on Von Ach's desk, and went to the polling place; that between 6 and 11 a.m. on August 10, 2000, there was no discussion about the work schedule for Friday, August 11, 2000; that he was relieved of his duties as an observer at 3:25 p.m. and he went back to his department; that he did not see any of the Parts Pickers in his group when he returned to his department, which was basically deserted, and no one was in the frame supervisors' office when he looked the second time he went by it; that Burris, who ended up not being an observer, was still at the plant since he was to give Burris a ride home; that production schedules are sometimes posted on a grease board by the timeclock by his supervisor; that he saw the grease board on his return to his department and there was nothing on the grease board; that he asked Burris about who was coming in Friday and Burris told him "that he was not sure who would be coming in but the usuals" (Tr. p. 79); that he left the plant at 3:40 p.m. with the understanding that the work schedule for Friday was

completely voluntary; that at no point in time did Von Ach tell him that he was needed for work on Friday, August 11, 2000; that he and Burris delivered a barbecue grill to a woman who had won it, and later he attended an election watch party at the Best Western in Neosho; that no one at the party advised him that he was supposed to work on Friday, August 11; and that no one telephoned his house on the night of August 10, about the work schedule for August 11.

Burris testified that he rode home with Guinn on Thursday, August 10, but his girlfriend gave him a ride to work that morning; that when he did not become an observer at the election, he clocked back in and he returned to work; that Von Ach came by on Thursday and told him he would be working 4 hours on Friday; that one of the parts pickers, Jackson, told him that the parts picker were working volunteer on Friday, August 11, that when he and Guinn got together at the end of the shift that day neither Von Ach nor any other supervisor was present in the supervisor's office as he went to clock out; that Guinn asked him if he heard whether they were working on Friday and he told Guinn that he had to work but parts pickers Robert and Mike said that they were volunteer and they were not coming in; that Von Ach did use the grease board, which has Monday through Friday on it, to schedule work; and that on Thursday August 10, 2000, the board was blank for Friday for parts pickers. On cross-examination, Burris testified that Von Ach used the board and then after the Board election in August 2000, Von Ach went to a system where he just came and told the employees individually; that if he did not hear anything different about Friday, 4 hours on Friday would be his regular work week; that when he rode home with Guinn, Guinn did not say anything to him about working the next day; that he told Guinn that both Robert Jackson and Mike Jeffers told him that Von Ach asked for volunteers to work on Friday, August 11, and that Guinn did not tell him that he was going to bale hay on Friday, August 11, instead of working.

Robert Jackson testified that on Thursday afternoon, August 10, Von Ach told him and Mike Jeffers that they did not have to come in the next day because he guessed that Von Ach said that he did not need that many people; that over the preceding 4 to 6 weeks before August 10, Collinsworth and Guinn would be asked if they wanted to work on Friday and most of the time they did so he and Jeffers did not work on Friday; that Von Ach did not tell him on Thursday, August 10, who would be working on August 11; that if Von Ach only needed one person to work on Friday and Collinsworth and Guinn did not want to work, he would be next in seniority and he would be asked if he wanted to work; that he did not remember seeing information on the grease board; that Von Ach speaks to the employees individually about working on Friday; and that Guinn was very vocal about supporting the Union. On cross-examination, Jackson testified that if Von Ach did not come around on Thursday, he would come in on Friday; that Guinn's name was not mentioned to him on Thursday, August 10, and that he did not remember Guinn telling him that he was planning to take Friday, August 11 off.

On Friday, August 11, Guinn went to the plant to get his paycheck. He testified that he arrived just before 9 a.m.; that he spoke with Von Ach and lead man Steve Morgan in the frame supervisors' office; that he told Von Ach that he was there to pick up his paycheck, Respondent's Exhibit 8; that Morgan made a comment that he had to work while Guinn got the day off; that Von Ach asked him why he did not call in, and he told Von Ach that he had slept through two alarms; that he took the question to be a joke; that during this conversation Von Ach did not indicate that he considered Guinn to have missed work and that he would be assessed attendance points; that Von Ach left the office and he left the plant; that it is his understanding that if an employee misses work after giving his supervisor sufficient notice, the employee gets a point or half a point depending on how much time is involved; and that if the employee does not call in 2 hours after his shift starts, it is classified as a no-call and double the points are assessed. Guinn further testified that at no time prior to August 11, 2000 had he ever failed to call in within the 2-hour time frame when he was going to miss work.

On cross-examination, Guinn testified that he began baling hay at noon or 1 p.m. and "[i]t was dependent on his brother's schedule. We work together in that capacity." (Tr. pp.119 and 120); that as shown by Respondent's Exhibit 7, he did receive two points for a no-call on July 27, 1997; that he also baled hay on one of the other volunteer Fridays between July 2 and August 11, 2000, but he could not remember which one, and otherwise he volunteered to work on these Fridays; that he understood Friday, August 11, to be voluntary for those who would come into work on a work–to–cover type basis, in case the Company needed production of something but did not need a full crew; that it was his understanding that no one was supposed to work that Friday in his classification unless they volunteered; that during the involved period he was scheduled to work 40 hours a week and that would include 6 to 10 a.m. on Friday; that during the 4 weeks before August 11 Van Ach did on occasion ask him if he wanted to volunteer off on Friday; that it is normal procedure that if he is not going to work on Friday, he requests his paycheck on Thursday; that he did not request his paycheck on Thursday, August 10because he was busy working as a union observer at the election on Thursday afternoon when the paychecks are generally given out; that he did not tell Von Ach at 6 a.m. on August 10, that since he was going to be off Friday he wanted his paycheck; that normally he gets his paycheck from his supervisor; that there is a procedure in place if an employee is not going to be there on a Friday, he can request his paycheck on Thursday afternoon; that he did not indicate in his affidavit to the Board that he told Von Ach, when Von Ach asked him why he did not call in, that he had been home baling hay; that, as indicated by his affidavit to the Board, he did not tell the Board agent that he told Von Ach that he slept through two alarms; that in response to Von Ach's question about why he had not called in, he did not mention either that he thought that it was voluntary or that he had told Von Ach on Wednesday that he would not be there; that he looked into the supervisor's office about 3:40 p.m. on August 10, 2000; that it was not very common for Von Ach to use the grease board; and that his supervisor made it a practice to meet with the employees on virtually every Thursday to make sure that the employees were clear on Friday's schedule because it varied depending on production.

Collinsworth testified that he thought that he worked on Friday, August 11, 2000, but he did not recall whether any other parts pickers in his family worked that day; that Friday, August 11, 2000, was a volunteer Friday and that Thursday evening Von Ach would come around to him and ask him if he wanted to work or if he wanted to be off, and he volunteered to work that Friday; that he did not remember whether Von Ach asked him individually if he wanted to work or if he was in a group when he was asked; that he could not remember if he knew that Guinn planned to be off on Friday, August 11, to bale some hay; that the grease board is utilized to communicate work schedules to employees; that Von Ach has used the grease board for work schedules; that if Von Ach could not get a sufficient number of volunteers, he required the employee or employees with the least seniority to come in on Friday; and that while he could not remember who worked Friday, August 11, 2000, he remembered that someone else did work that day. On cross-examination, Collinsworth testified that his regular 40–hour schedule was four 9 and 4 hours on Friday; that during August 2000 if he did not hear from Von Ach on Thursday about working on Friday, he would find someone to determine what the situation was for Friday since he was scheduled to work on Fridays and he would want to know if they were letting people off; that on Thursdays Von Ach came to him and told him how many Pickers he needed on Friday and gave him first choice, since he had the most seniority, as to whether he wanted to work or not in those situations where less than four Pickers were needed; and that the grease board would not work to let two workers know that they were supposed to work on Friday since the board only has a "little bitty square for a number." (Tr. p. 186.)

Burris testified that he did not remember which of the Parts Pickers worked on August 11, 2000; and that Von Ach asked him if he heard anything about if Guinn was coming in or not and he told Von Ach that he had not heard.

On Monday, August 14, 2000, Guinn was told at about 1 p.m. that he had received two points for a no-call on Friday, August 11, 2000, by another employee, Jackson. Jackson testified that he heard on Monday that Guinn had received 2 days for not coming in on Friday, August 11.

On Tuesday, August 15, 2000, Guinn spoke with Von Ach just after the first break. Guinn testified that he asked Von Ach how he counted Guinn's attendance on August 11, 2000, and Von Ach told him "no-call"; that when he asked Von Ach what that meant, Von Ach told him that he did not call in; that he told Von Ach "well, no kidding" (Tr. p. 90); that he did not tell Von Ach that he had previously told him that he needed to be off on August 11, 2000; that he then told Von Ach that he needed to see Larry Reynolds, who is the department manager and Von Ach's immediate supervisor, on this issue; that he learned that Jackson and Collinsworth had worked on August 11, that he spoke with Reynolds Tuesday about 1:30 p.m., and he asked Reynolds to investigate the situation; that Reynolds was not aware that he had told Von Ach earlier in the week that he would be off on August 11; that he told Reynolds that everybody, including Von Ach, knew that he was going to be off on August 11 to bale hale; and that Reynolds did not take notes during their conversation. On cross-examination, Guinn testified that he did not tell the Board agent that he told Reynolds on August 15, 2000, that he notified Von Ach on August 9, 2000, that he was not coming to work on August 11. On redirect Guinn testified that when he found out that he was assessed points for what he understood to be a volunteer work day, he believed that August 11 had been transformed into a mandatory work day.

On Wednesday, August 16, 2000, Guinn saw Reynolds who told him that Von Ach's decision was right, Von Ach needed people for that department on August 11 it was made a mandatory day, and he was standing behind Von Ach's decision. Reynolds presented Guinn with General Counsel's Exhibit 4, which is an employee attendance "1st Notification" indicating, among other things, that Guinn received two points on August 11, 2000, for no-call. The 1st notification indicates that Guinn chose not to sign it. Guinn testified that he told Reynolds that it is bogus, not fair, not accurate, and he wanted a meeting in the front office; that Reynolds asked him who he wanted to speak to; that he told Reynolds that he wanted to speak to David Layman, who is the vice president of residential; that the normal procedure would have been to take the next step and see a plant superintendent or a human resources department manager and then on up the ladder to Plant Manager Tice; and that Reynolds agreed and said that he would set up the meeting.

On August 22, 2000, at 2 p.m. Guinn met with Layman. Guinn testified that he told Layman that Van Ach was headhunting, it looked like he wanted to take out a union organizer, and the volunteer Friday, his seniority, and his notification were totally ignored; that Layman took notes; and that Layman told him that he would have to place the matter in Tice's hands. On cross-examination Guinn testified that he did not tell Layman that he talked to Von Ach on Wednesday and asked off; and that he told Layman during his meeting with him that his supervisor was aware that that Friday he was going to be home baling hay.

Guinn testified that a few days later he met with Tice and Kevin Wilson, the human resource manager; that he told them what happened "and relayed to Dan and Kevin that this supervisor had notification" (Tr. p. 105); that Tice asked him if he knew that Friday was a regular part of his work schedule and he said yes; that there was a discussion about whether August 11 was a mandatory work day; that he told Tice and Wilson that he was not notified of any change in his work schedule for that week; that Tice and Wilson stated that he had notified Von Ach that he was going to be off that Friday; that there was quite a bit of discussion about whether someone had the responsibility to notify him or he had the responsibility to check regarding his schedule; that he told Tice and Wilson that the supervisor had the sole responsibility to get with the employees and since he was an observer he was not on the clock and Von Ach made no attempt to contact him; that Tice and Wilson indicated that he had a shared responsibility to find out what his work schedule was for Friday, August 11, 2000; that Tice and Wilson told him that Friday, August 11 was mandatory for him; that Tice was "doodling" with a pen and paper but Tice was not taking notes; that he told Tice and Wilson that he did not want to mitigate in these circumstances; that Tice did not ask him if he was under the impression that he was required to work on Friday, August

11, 2000, Tice did not ask him if he told his supervisor on Thursday that he was not going to be in on Friday, Tice (or Wilson) did not ask him if Von Ach was present in the work area when he returned from his election duties, and Tice did not ask him whether he tried to search out Von Ach on August 10, 2000; that he never admitted in this meeting that when he clocked out at 11 a.m. on August 10, 2000 he assumed that he would be going to work the next day; that he never asked Tice or Wilson to compromise and take 1 day away since both parties were at fault; and that the meeting ended with Tice indicating that he was going to speak with the different supervisors who were involved and he would come up with a decision. On cross-examination Guinn testified that he told Tice and Wilson that his supervisor was aware and notified that he was going to be off for that Friday; that he did bring up the fact that one other time a call-in was mitigated by Wilson; and that he brought this up in the context of everything being loose, he never knew what his schedule was going to be.

Sometime later Guinn met with Tice, Wilson, and his new Supervisor, Roy Langford. Guinn testified that Tice told him that he had reviewed the situation with the lead team, reviewed prior similar situations, he felt that Guinn's situation was handled correctly, and he was going to uphold the two points. On cross-examination Guinn testified that he was never told at any of the meetings regarding what happened on August 11, 2000 that they had made this Friday a mandatory workday.

Wilson sponsored Respondent's Exhibit 13 which is two pages of unsigned notes of Reynolds regarding the August 11, 2000 situation, Respondent's Exhibit 9 which is Layman's notes dated August 21, 2000, Respondent's Exhibit 15 which is a seven-page memorandum signed by Tice dated September 1, 2000, Respondent's Exhibit 16 which is his memorandum to file regarding meetings of August 28 and 29, 2000, with respect to the August 11, 2000 incident, and Respondent's Exhibit 17 which is an attendance record for August 11, 2000, relating to Guinn. All of these documents were placed in Guinn's file. Wilson testified that the two points for no-call/no-show is enforced consistently without regard to union views; that he met with Tice and Guinn; that during the meeting Guinn said that there was fault on both sides and he thought they could compromise on the points but Tice refused; that he did not believe that Guinn, during this meeting, ever said that he told his supervisor on August 9, 2000, that he was not going to be in on August 11, 2000; that after discussing the matter with Von Ach, Reynolds and the lead team, it was decided to let the two points stand; that the enforcement of the no-call policy against Guinn was consistent with how the policy had been enforced over the time period that he worked at the Company; that if an employee is not going to work on Friday they can request to pick up their paycheck on Thursday afternoon, which is a common practice; and that supervisors were told not to go anywhere near the polling place, not to have discussions with employees in their office, and not to have any group meetings with employees within the last 24 hours before the Board election. On cross-examination Wilson testified that he did not know that on August 11, 2000 only one Parts Picker worked; that he believed that Von Ach told them that August 11, 2000 was a volunteer Friday, he did not need a full complement of employees, and the junior employees did not work that day; that Von Ach told him that, with respect to the Friday schedule, he would typically communicate it to the employees directly or by using the grease board; that unless Guinn was told otherwise, he should have come to work on August 11, and it was his responsibility to find out whether he was working on Friday August 11; that Von Ach told him that at no time did Guinn say that he would not be in on Friday; that he did not recall ever mitigating an attendance dispute with Guinn before, and he did not have a policy of doing that; that Guinn said that he felt that the assessment of the points was a result of his support of the Union; that August 11 was a volunteer Friday and Guinn was the second most senior parts picker; that for several weeks before August 11 the Fridays had been volunteer; and that Von Ach told him that he left the building around 4 p.m.

On redirect Wilson testified that Guinn was supposed to notify Von Ach if he did not want to work on Friday; that if there was not communication between Guinn and his supervisor then the regular schedule controlled; and that the policy is that employees have the opportunity not to work by seniority but he has to talk with his supervisor or he is scheduled to come to work.

Von Ach testified that he first became a supervisor with the Respondent in mid-July 2000 and he set up a procedure whereby he notified employees regarding how much time he needed on a Friday; that the regular schedule for each employee was four 9 and 4 hours on Friday; that he discussed the schedule for Friday on Thursday around 1:30 p.m. and if there was overtime, he discussed this with each and every one of the involved employees; that when there was not enough work for all of the employees on Friday he "would talk to the individuals and go by seniority and on a group basis I would have them work it out among their selves [sic] and then I would make the final decision when they could be off—who could be off" (Tr. p. 308); that the situation was never called a voluntary Friday; that the employees were scheduled to work on Friday absent notice from him differently; that he used the grease board mainly for the second shift; and that he communicated with his first shift employees one–on–one or, in other words, by personal notification. Von Ach gave the following response to the following question:

> Q. On the day before, on Wednesday, the 9th, did Mr. Guinn come to you and tell you that he would like Friday off to bale hay? [Emphasis added.]
> A. No. [Transcript page 310.]

Von Ach further testified that on Thursday, August 10, 2000, he decided that he only needed two or three Parts Pickers on Friday August 11, 2000; that "I got . . . [the Parts Pickers] together like I always have and they worked it out amongst their selves [sic] and I think it was Mike Jeffers decided that he would like to have the time off and the other two agreed or three or two, excuse me. Two agreed and I let him off—scheduled him off." (Tr. pp. 311 and 312);[2] that the other three

[2] As noted above, Jackson and Jeffers did not work on Friday, August 11, 2000. Normally there would be four in the group. But Guinn was an election observer at the time so the group could only consist, at

(Collinsworth, Guinn, and Jackson) were to work their regular hours; that he had been instructed to stay away from the polling place; that he believed that he was in his office from 3:30 to 4 p.m. on August 10, 2000, and Guinn did not come into his office during this period; that he was sure that he left work after 4 p.m. on August 10; that on August 11, 2000, when Guinn came in, he asked him what was going on, where he had been, Guinn said that he had slept through two alarms, he was going to take off, and he wanted his check; that he was not joking when he asked Guinn where he had been and they were not laughing; that Guinn did not ask for his paycheck on Thursday to be off on Friday; and that he recorded Guinn's absence, Respondent's Exhibit 17, as a no-call in. Von Ach gave the following testimony:

> Q. At any time did he [Guinn] ever allege to you that he had called you on Wednesday, August 9th and you had forgotten? Excuse me, not called you, had told you on Wednesday, August 9th that he wanted off on Friday and that you had forgotten that?
>
> A. No.
>
> Q. He never alleged that he had done that? You have to answer yes or no.
>
> A. I am sorry. No.

On cross-examination, Von Ach testified that he was aware that Guinn was a strong union supporter; that he believed that three Parts Pickers were going to work on Friday, August 11, 2000; namely, Collinsworth, Guinn, and Jackson; that a few weeks prior to August 11, 2000, the Company had some short workweeks; that on August 10, 2000, between 3:30 and 4 p.m. he met with at least one other supervisor in his office, namely Steve Perkins and he was not sure whether Supervisor Cliff Smith was there; that Perkins may have stepped in and out of the office once or twice to get his people ready for production; that he could not say for sure that he ever left the office between 3:30 and 4 p.m. on August 10, 2000, "I may have stepped out for some reason" (Tr. p. 324); that he did not ask Burris on August 11, 2000, where Guinn was; that the first time he notified Guinn that he had been assessed two points for August 11 was the following week when Guinn asked him about the previous Friday; and that on the morning of August 10, 2000, he spoke with Guinn and Burris separately because he had been instructed not to have employee group meetings during that time period. On redirect Von Ach testified that Guinn's regularly scheduled hours for Friday were not changed on Thursday, August 10, so there was nothing to notify him about.

Reynolds, who was the department manager in the frame department at the time involved here, testified that on Monday, August 14, 2000 (a) Von Ach told him that he had charged Guinn two points for August 11, 2000, because he had not called in within the first 2 hours of the shift, and (b) Guinn indicated to him that he wanted to talk to Tice or Allen about the situation; that he met with Guinn about his attendance 1st notification, General Counsel's Exhibit 4, on August 16, 2000; that the notification includes two points for August 11, 2000; that Guinn choose not to sign the notification; and that Respondent's Exhibit 13 are the notes he made regarding the situation and turned into Wilson. The notes read, in part, as follows:

> On 8-10-00 Jerry got with his parts pickers and told them he needed 3 of them to work Friday (8–11–00). Jerry said he goes by seniority when he gets with his people. Jerry said the parts pickers . . . [have] been letting each other off if one of them needs off for a certain reason. They still go by seniority doing this. On 8–11–00 Mike Jeffers needed off. Klint had . . . [taken] off at 11:00 to be observer for the union election. Jerry was told to stay away from the voting area and he said he did. Klint had worked Fridays except for one he took off.

Reynolds also testified that he could not remember if he spoke with Guinn about what happened regarding August 11, 2000; that he spoke with Wilson about the situation after Guinn had met with management; and that the points assessed against Guinn was a consistent enforcement of the no-call policy. On cross-examination, Reynolds testified that his above-described notes are his recollections of what Von Ach told him he understood the circumstances to be; that he indicated in his notes that August 11 was not a voluntary day because that is what Von Ach told him; that he did not recollect that Jackson did not work on August 11; that Von Ach explained to him how he goes about picking people when he needs less than a full crew and that is "he does it on a voluntary basis, asks the employees who wants to work and [it] is . . . [his] understanding that that voluntary system is such that the most-senior employee gets first shot" (Tr. p. 339); that he knew that Guinn was the second most senior employee behind Collinsworth; that it caused him concern that Von Ach had met with the parts pickers on August 10, 2000, and with a voluntary system it was decided who was going to be on the schedule and who was going to be off, and Guinn was not a part of the meeting; that he asked Von Ach about that and Von Ach said that Guinn had always worked Fridays except for one when he was baling hay; and that Guinn told him that he did not think that he should be charged two points for August 11, 2000.

Tice, who is the plant vice president and general manager at the Neosho plant, testified that the Company instructed its supervisors not to go near the polling place on election day and not to have group discussions with the employees within the last 24 hours before the Board election; that he did have a conversation with Guinn about production rates but when he said "that is not the answer" he pointed at the union button Guinn was wearing and he did not flip the union button; that Layman told him that he had a meeting with Guinn about the two points, Layman gave him his notes of the meeting (R. Exh. 9), and Layman asked him to review the notes and look into the situation; that subsequently he and Wilson met with Guinn and he made notes of that meeting, Respondent's Exhibit 15; that Re-

---

the most, of three employees, namely Collinsworth, Jackson, and Jeffers. It is not clear how "[t]wo agreed" when Jackson and Jeffers were told by Von Ach that they could take Friday, August 11, 2000, off. The Respondent undoubtedly has business records which would show whether or not Jackson worked on August 11, 2000. Such records were not introduced by the Respondent to show that Jackson's testimony about not working on August 11 was in error. Jackson's testimony is credited. He did not work on August 11. And he was told on August 10, 2000, that he would not be working on August 10.

spondent's Exhibit 15 is dated September 1, 2000, because he took notes of his various meetings regarding this situation and then he made Respondent's Exhibit 15 and destroyed his original notes; that Guinn complained that the parts picker who worked on August 11, 2000, only worked 3 hours and he did not believe that it was fair to get two points on a day when there was only 3 hours of work in his area; that until the trial herein he had never heard that Guinn told Von Ach on Wednesday, August 9, 2000, that he would not be at work on Friday, August 11, and, therefore, he should only get one point; that Guinn also argued that Friday, August 11, was voluntary only and he should have been offered the time off instead of somebody else, and he was not notified that it was mandatory work for him; that Guinn admitted to him that when he left his work position at 11 a.m. on Thursday, August 10, 2000, he was under the impression that he was scheduled to work on Friday; that he did not recall if he asked Guinn if anything had changed Thursday afternoon after he left his work position; that he told Guinn that it was his responsibility to check with his supervisor if he was not sure with respect to the hours he was supposed to be working; that when he asked Guinn if he told his supervisor on Thursday that he needed to be off on Friday, Guinn answered "no"; that Guinn told him that there was probably enough fault here on both sides "[w]hy do not we just split it down the middle" (Tr. pp. 355 and 356); that he told Guinn either two points would be assessed or none would be assessed; that after he met with those involved and the lead team it was decided that the two points should stand, and Guinn was informed of the decision; and that the Respondent has a 1–year rolling attendance policy and after 1–year occurrences go off.

On cross-examination, Tice testified that before the trial herein he had never heard that Guinn informed Von Ach prior to Thursday, August 10, 2000, that he wanted to be off that Friday to bale hay; that a portion of his notes, which are dated September 1, 2000, read as follows: "I asked Jerry if Klint [Guinn] had mentioned to him that he was not coming in on Friday because of having to work in his hay field and Jerry said Klint had not"; that he understood that if Von Ach needed less than a full complement of employees he would go to the most senior employees and ask them if they wished to work; that he did not ask Guinn if he asked Von Ach on Wednesday, August 9, 2000, to be off on Friday; and that as part of his investigation of the matter he did not speak with Collinsworth, Jackson, or Jeffers.

ANALYSIS

As set forth by the National Labor Relations Board (Board) in *Fluor Daniels, Inc.*, 304 NLRB 970 (1991):

> In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982),[4] The Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.[5] The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence.[6] That finding may be inferred from the record as a whole.[7]

[4] Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[5] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

[6] *Association Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *White-Evans Service Co*., 285 NLRB 81, 82 (1987).

[7] *ACTIV Industries*, 277 NLRB 356, 374 (1985); *Heath International*, 196 NLRB 318, 319 (1972).

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish union activity, employer knowledge, animus,[3] and adverse action taken against those involved or suspected of involvement which has the effect of discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

In order to determine what happened and the underlying motivation it will be necessary to make findings with respect to the credibility of certain witnesses. In making credibility resolutions one should be mindful of the words of Chief Judge L. Hand in *NLRB v. Universal Camera Corp.*, 170 F.2d 749, 754 (2d Cir. 1950), that:

> It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.

On brief counsel for General Counsel contends that because the Board's Order and Direction of Second Election in Case 17–RC–11879 (GC Exh. 2), which adopted the Hearing Officer's Report on Objections (GC Exh. 3), is a final decision, findings therein can be relied on as evidence of animus, *Advertisers Mfg. Co.*, 275 NLRB 100, 102 (1985); that with the advent of the 2000 organizing campaign, the Respondent suddenly discovered its no-solicitation, no-distribution rule and only enforced it with respect to union distribution and solicitation by employees; that Phillips, who was an open active supporter of the organizing effort was an early victim of the Respondent's crackdown on union activity among the employees; that Harris' comments to Phillips on June 16, 2000 (that Harris would hate to lose a good inspector and Phillips should consider the discussion a verbal warning), constitute a disciplinary warning in retaliation for union activity; that the conference

[3] As pointed out by the Board in *NACCO Materials Handling Group, Inc.*, 331 NLRB 1245 (2000), the record, when fairly considered as a whole, should 'contain substantial evidence of antiunion animus.'

with Harris and Allen was Phillips' step one; that the Respondent's former human resources manager, Wilson, admitted that the sole reason for keeping the memoranda about the meeting would be to justify the Respondent moving to step two for a future infraction; and that Phillips' discipline was designed to stifle union activity, discourage membership in PACE, and undercut Phillips' enthusiasm for the PACE campaign.

The Respondent on brief argues that the findings from Representation Case 17–RC–11879 are not relevant in that the legal standard for overturning an election and of finding an 8(a)(3) violation are different; that at the trial herein counsel for General Counsel entered into a nonadmission settlement agreement with the Respondent as to certain of the allegations litigated in the above-described representation case, and, therefore, should not be allowed to rely on the findings in that representation case; that the conduct litigated in the representation case cannot serve as 'background' to the conduct complained of as to Phillips in that the situation involving Phillips occurred pre-Petition, and, therefore, occurred prior to any of the events or issues litigated in the representation case; that such background of animus approach was rejected by the court in *NLRB v. Best Products Co.*, 618 F.2d 70 (9th Cir. 1980);[4] that to admit General Counsel's Exhibits 2 and 3 while at the same time "rejecting from the Record certain portions [the portions assertedly deal strictly with the credibility of Guinn] of the transcript testimony in that Representation Case as offered by the Respondent . . . violates the Respondent's due process rights" (emphasis added, R Br. 5); that General Counsel's Exhibits 2 and 3 should not be relied on as proof of union animus in the instant case; that Wilson "received notice of a complaint from an employee . . . that . . . Phillips . . . threatened him that if he did not sign a union card, his work would be rejected by . . . Phillips" (R Br. 6);[5] that the Respondent did not give Phillips a verbal warning over this incident and even if it did, the warning expired after 3 months; that General Counsel has not demonstrated union animus as the motivation for the meeting; that General Counsel presented no evidence contesting that management received the complaint accusing Phillips and, therefore, the meeting and the documentation of such meeting were appropriate;[6] that Phillips remains an employee of the Respondent; and that the Respondent's involved actions with respect to Phillips were not motivated by union animus and, therefore, there was no violation of the Act.

Counsel for General Counsel has established that Phillips engaged in union activity and his supervisor had an opportunity to observe his support for the Union. With respect to anti-union animus, as noted above, the Report on Objections and the Board's Decision and Direction of Second Election in Case 17–RC–11879 were received in evidence at the trial herein. Some of the conduct of the Respondent during the pertinent portion of the organizing campaign resulted in the Board setting aside the election. While this conduct occurred shortly after the above-described Phillips incident, and while the conduct has not been found specifically to be a violation of Section 8(a)(1) and (3) of the Act, it occurred during the same organizing drive when Phillips was disciplined and findings with respect thereto are relevant in determining whether there was anti-union animus on the part of the Respondent during the involved organizing drive. In its above-described Decision and Direction of Second Election the Board adopted the hearing officer's findings. The hearing officer found that the Respondent (1) threatened discipline if an employee engaging in activities on behalf of the Union, (2) showed employees a video of interviews of management officials and others conveying the message of the adverse consequences (plant closure and/or severe cutbacks not based solely on economic necessity and therefore inherently coercive of employee Sec. 7 rights) the employees may expect if they select the Union as their bargaining representative, (3) through a supervisor told an employee that if the Union was selected it would result in the closing of Neosho plant and the moving to the Employer's Siloam Springs, Arkansas plant,[7] (4) through a supervisor told an employee that if the Union was voted in, the Respondent would shut the wood room down and move it to another plant, and (5) posted a poster which suggested that a strike and subsequent closure is the inevitable consequence if the employees select the Union as their bargaining representative. As found, some of the conduct of the Respondent was inherently coercive of the employees' Section 7 rights. Such conduct (or misconduct) was serious. It clearly warrants a finding that there was substantial anti-union animus on the part of the Respondent. Obviously, the Board's findings in the prior representation proceeding could not be the sole basis for finding certain conduct to be violative of Section 8(a)(1) and (3) of the Act since the issues are different in the two types of proceedings. *Helena Laboratories Corp.*, 225 NLRB 257 (1976). But that is not what is being done here. The Respondent and General Counsel reached a settlement of the 8(a)(1) allegations in the complaint involved in the instant proceeding with a non-admission clause. That settlement, however, does not preclude the use of the Board's findings with respect to the type of conduct engaged in by the Respondent during the organizing drive. Also, there was no harassment.

[4] There the court concluded that the infractions in the prior recognition election were relatively minor and did not rise to the level of unfair labor practices; and that the evidence in support of the inference of anti-union sentiment is not substantial. For the reasons specified below, the infractions in the instant case were serious and substantial.

[5] The Respondent did not call the employee who was allegedly threatened or the father, a supervisor, of the employee who allegedly told Wilson of the alleged threat. Indeed Wilson did not even testify that he spoke with the employee who allegedly received the alleged threat.

[6] If the General Counsel makes a prima facie showing, the Respondent has the burden of going forward to demonstrate that the same action would have taken place notwithstanding the protected conduct or, in other words, that there was a business justification for its action. As noted above, the Respondent did not call the employee who allegedly received the alleged threat. Indeed, the Respondent did not even call the father, a supervisor, who allegedly relayed the alleged threat that his son, the employee, allegedly received. The Respondent was satisfied to proceed with at best third-hand testimony. (We do not know if the alleged threat was allegedly made directly to the employee or indirectly through someone else.)

[7] As was pointed out, the Board has consistently held that the threat of plant closure is more coercive than any other threat and more likely to have an everlasting effect upon an employee group.

The unlawful conduct of the Respondent involved here, the verbal warning, directly involved Phillips' union activity, soliciting on behalf of the Union. This in itself demonstrated the Respondent's anti-union animus. As noted above, I find that Phillips was disciplined. His testimony that Harris told him that he should consider this his verbal warning is credited. The printouts of the above-described e-mails were placed in Phillips' file at the direction ("File") of the Respondent's then human resource manager. All was ready for step two. An adverse action was taken against Phillips which was intended to discourage union activity. Counsel for General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision.

Consequently the burden of going forward has shifted to the Respondent to demonstrate that the same action would have taken place notwithstanding the protected conduct. If there was no threat, there was no business justification for the June 16, 2000 disciplinary meeting with Phillips. On the one hand, we have Phillips testifying in person at the trial herein that he did not make the alleged threat. On the other hand the Respondent is satisfied to present only the testimony of someone, Wilson, who allegedly spoke to someone who was not called as a witness, who allegedly spoke to someone else who was not called as a witness and who allegedly heard the threat uttered directly or indirectly through someone else (we do not know) to the someone who the Respondent obviously did not want to subject to cross-examination. This is how the Respondent meets its burden of showing that it had a business justification for Phillips' discipline which it now claims was not a discipline.[8] The testimony of Phillips, in these circumstances, is credited. Phillips never made the alleged threat. The Respondent has not shown that it had a business justification for taking the action it did against Phillips. The Respondent wanted to discourage union activity, solicitation, even though up to that point in time it had allowed all kinds of solicitation. With respect to Phillips, the Respondent violated the Act as alleged in paragraph 6 of the complaint.

On brief counsel for General Counsel contends that the Section 10(b) of the Act period commences only when a party has clear and unequivocal notice of the action giving rise to an alleged violation of the Act, *Amalgamated Industrial & Service Workers Local 6 (X-L Plastics)*, 324 NLRB 647 (1997), and Guinn was not told of the assessment of the attendance points until he asked his supervisor on August 15, 2000; that accordingly, the charge alleging discriminatory treatment of Guinn was filed within the 6-month period prescribed by Section 10(b) of the Act; that by letting Von Ach know on Wednesday, August 9, 2000, that he would not be working on Friday, August 11, 2000, Guinn was exercising his seniority rights under the voluntary work system that had developed in the department; that even if Guinn did not give advance notice, it did not legitimize the Respondent's conduct; that when Von Ach determined on Thursday, August 10, 2000, that he needed only two employees to work on Friday and he decided to let the employees use the seniority system to choose whether to work or not, fair treatment obligated him to let Guinn make his choice; that according to the Respondent's position, Von Ach disenfranchised Guinn and effectively made the choice for him; that Von Ach then compounded the situation by leaving Guinn ignorant about his work assignment for Friday; that if Von Ach assumed that Guinn would have opted to work had he been given a chance, he should have communicated that to him; and that the Respondent seized on the opportunity to slap a penalty on a strong Union supporter.

The Respondent on brief argues that the charge with respect to Guinn's attendance points was not filed within the 6–month statute of limitations as required by Section 10(b) of the Act in that Guinn knew on August 11, 2000, that he would be assessed two points and the charge was not filed until February 13, 2001, and it was not served until February 14, 2001; that the Hearing Officer's Report and the Board's Decision adopting the findings in that Report in Case 17–RC–11879 should not be relied upon as proof of union animus for the reasons specified above but in particular with respect to Guinn because the Respondent was denied due process in that while the Report and Board's Decision were received, portions of the transcript in the objections hearing were placed in the rejected exhibit file; that Guinn advanced three different and inconsistent positions in that he testified that (1) on Wednesday, August 9, 2000, he requested to be off on Friday, August 11, 2000, (2) August 11 was a volunteer workday, and (3) being assessed two points for missing a 3–hour day was unfair; that Guinn was not a credible witness; that Guinn was scheduled to work on Friday, August 11 and hearing nothing different from his supervisor, he should have reported to work or called in; and that pursuant to the Respondent's handbook, the two points assessed on Guinn's attendance record roll off after 1 year, or, in other words, on August 11, 2001.

The 10(b) period did not commence until Von Ach notified Guinn on August 15, 2000, that he was being assessed two points for August 11, 2000. Counsel for General Counsel has established that Guinn engaged in union activity, including being an observer for the Union at the Board election. Tice made an issue of the fact that Guinn was wearing a Union button during a meeting on production rates. Von Ach spoke with Guinn about clocking out to be a union observer at the Board election. The Respondent knew of Guinn's union activity.

With respect to antiunion animus, as noted above, the Report on Objections and the Board's Decision and Direction of Sec-

[8] Although it has not been factored in, the alleged threat flies in the face of common sense. Obviously if Phillips ever tried to carry out such an alleged threat, there would be immediate proof, the rejected piece of furniture, for the victim to show to substantiate his claim that the rejection was unwarranted. Indeed it allegedly took little time for management to check its records to determine if there was anything out of the ordinary, if indeed such a check was conducted. Additionally, while the second person in line (or perhaps the third), to which the alleged threat was allegedly relayed, Wilson, testified in general terms, namely "because . . . this individual was not . . . for the Union, was for the company" (Tr. pp. 254 and 255), the person behind him in this line, Harris, for some unexplained reason was able to be more specific, namely Phillips "threatened to turn his units around if he did not sign a Union card." (Tr. p. 286.) It is interesting that someone further back in the line apparently knows more than the person in front of him when the position taken is that knowledge emanated from the head of the line.

ond Election in Case 17–RC–11879 were received in evidence at the trial herein. Regarding Guinn, the Respondent makes the additional argument that it was denied due process in that while the Hearing Officer's Report and the Board's Decision were received, I would not take notice of portions of the transcript of the objections hearing offered by the Respondent, and they were placed in the rejected exhibit file. At the trial in the instant proceeding the Respondent requested notice of portions of the transcript in the above-described objections hearing to show that Guinn and his wife allegedly gave contradictory testimony in that proceeding; that Guinn "testified in that Hearing and that his wife directly contradicted him. That, in and of itself, is an issue that could weigh on his credibility because his wife told a story and he told a story. Which one you believe does not matter." (Tr. pp. 163 and 164.) Contrary to the assertion of the Respondent, for this matter to adversely affect the credibility of Guinn, I would have to credit the testimony of the wife, who did not testify before me, to the extent it contradicted, according to the Respondent's attorney, Guinn (and it is not clear that it does). Additionally to conclude as the Respondent's attorney ostensibly does regarding this matter, I would have to find that Guinn was not unintentionally mistaken. On pages 10, 11, 12, and 13 of his Report on Objections, the hearing officer treated this matter and made a number of findings with respect thereto. As noted above, his findings were adopted by the Board. While there may have been conflicts in the testimony regarding a message from Guinn's wife to him at the Respondent's Neosho plant on August 9, 2000, such conflicts, to the extent they may exist, do not demonstrate that Guinn is not a credible witness. The Respondent's argument regarding taking notice of a portion of the record in the Objection hearing has no merit. The Respondent has not been denied due process. The Board's findings in the above-described objections case will be considered with respect to Guinn. As found by the Board, some of the conduct of the Respondent during the organizing drive was inherently coercive of the employees' Section 7 rights. Such conduct (or misconduct) was serious. It clearly warrants a finding that there was substantial anti-union animus on the part of the Respondent.

Here, the Respondent did take an adverse action against Guinn, assessing him two attendance points, which has the effect of discouraging union activity. Von Ach had established a practice in situations when he needed less than a full complement of employees on Friday whereby he would tell the employees how many he needed and let them decide who would get the hours with those with the most seniority deciding first whether they wanted to work. The credible evidence of record indicates that on August 10, 2000, Von Ach needed two of the four parts pickers to work on Friday, August 11, 2000. The employee with the most seniority, Collinsworth, indicated that he wanted to work. Although Guinn, who after Collinsworth had the most seniority among the involved parts pickers, was in the plant when it was decided who would work, Von Ach did not accord him the opportunity to exercise his seniority allegedly because he was engaged in being an observer for the Union at the Board election held in the plant. Von Ach treated Guinn different than Collinsworth while Guinn was engaged in union activity, being an observer for the Union at a Board election. The General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision.

Has the Respondent met its burden of demonstrating that the same action would have taken place notwithstanding protected conduct? I do not credit the testimony of Von Ach that he needed three parts pickers to work on August 11, 2000. He gave this testimony for a reason. Allegedly Jeffers wanted to take the Friday, August 11 off. Consequently, if Jeffers was excluded from consideration and if Von Ach needed three parts pickers on August 11, Guinn's seniority would not come into play. But Von Ach only needed two parts pickers on August 11, 2000. Jackson's testimony is credited. Von Ach told him that he only needed two parts pickers to work on August 11and Jackson and Jeffers, both of whom had less seniority that Guinn, would not be working. The Respondent gave a false reason, namely that it needed three parts pickers on Friday, August 11, in defense. An inference is warranted that the true motive is an unlawful one that the Respondent desires to conceal.

I do not credit Guinn's testimony that he told Von Ach on August 9, 2000, that he would not be working on Friday, August 11, 2000. Von Ach's denial regarding this alleged August 9, 2000 request is less than unequivocal. As noted above, Von Ach answered "No" to "did . . . Guinn come to you and tell you that he would like Friday off to bale hay?" (Emphasis added.) Guinn did not testify that he went to Von Ach. Rather Guinn testified that he told Von Ach when he was walking by Guinn's work area. But the fact that Guinn did not at the time point out at each and every opportunity, as one would expect, that he had told Von Ach on August 9, 2000, that he would not be in on August 11, 2000, leads me to believe that this was a post hac rationalization. Additionally, Guinn's testimony that all of his coworkers knew that he was going to take Friday August 11, 2000, off to bale hay was not corroborated.

If it was a voluntary day—as it was—when only two Parts Pickers were needed, Von Ach should have given Guinn the opportunity, in accord with the practice Von Ach established, to decide whether he wanted to work on August 11, 2000. I do not believe, in light of the fact that Guinn had already taken a Friday off to bale hay, that Von Ach could reasonably assume that Guinn, if given the chance to decide, would work on Friday August 11. The Respondent's argument, in effect, that it could not treat Guinn the same as the other Parts Pickers because he was at the time an observer for the Union at the Board election is not reasonable. A minimal effort would have been involved in having another employee go and ask Guinn, after explaining the situation to the Board agent present, if he wanted to work on August 11. When someone is discriminated against because of and at the time they are engaged in the type of union activity involved here, being an observer at a Board election, obviously the Employer's conduct will be closely scrutinized. The last thing anyone should want to see is to have someone discriminated against or punished because he participated in one of the most important activities under the Act, protecting the right of employees and an employer to have a fair election. Here Von Ach had held this first supervisory position for about 1 month when the election was held. But he did not have final say with

respect to this matter. It is hard to believe that absent an agenda, those more experienced in management would not have acted reasonably in these circumstances. I do not believe that in the circumstances extant here that the Respondent has demonstrated that the same action would have taken place notwithstanding the protected conduct. The Respondent violated the Act as alleged in paragraph 6 of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By issuing a verbal warning to John Phillips because he formed, joined, and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities Respondent violated Section 8(a)(1) and (3) of the Act.
4. By assessing two attendance points against Klint Guinn because he formed, joined, and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities Respondent violated Section 8(a)(1) and (3) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, LA-Z Boy Midwest, a Division of LA-Z Boy Incorporated, Neosho, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing a verbal warning to John Phillips because he formed, joined, and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

(b) Assessing two attendance points to Klint Guinn because he formed, joined, and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files and/or records: (1) any reference to the unlawful verbal warning to John Phillips, and (2) the two attendance points unlawfully assessed to Klint Guinn for August 11, 2000, and, within 3 days thereafter, notify John Phillips and Klint Guinn in writing that this has been done and that the verbal warning and the attendance points, respectively, will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its Neosho, Missouri facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 16, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue a verbal warning to you because you formed, joined, and assisted any union and engaged in concerted activities and to discourage you from engaging in these activities.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT assess attendance points against you because you formed, joined, and assisted any union and engaged in concerted activities and to discourage you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board Order, remove from our files and/or records: (1) any reference to the unlawful verbal warning to John Phillips, and (2) the two attendance points unlawfully assessed against Klint Guinn for August 11, 2000, and WE WILL, within 3 days thereafter notify, John Phillips and Klint Guinn in writing that this has been done and that the verbal warning and the attendance points, respectively, will not be used against them in any way.

LA-Z BOY MIDWEST